**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**NO. 2009-CA-01365-COA**

**ELIZABETH MARTIN** **APPELLANT**

**v.**

**ST. DOMINIC-JACKSON MEMORIAL HOSPITAL** **APPELLEE**

| | |
|---|---|
| DATE OF JUDGMENT: | 05/14/2009 |
| TRIAL JUDGE: | HON. W. SWAN YERGER |
| COURT FROM WHICH APPEALED: | HINDS COUNTY CIRCUIT COURT |
| ATTORNEYS FOR APPELLANT: | MICAH B. DUTRO<br>RAMEL L. COTTON |
| ATTORNEYS FOR APPELLEE: | SHARON F. BRIDGES<br>JONATHAN R. WERNE<br>LANE W. STAINES<br>JOHN E. WADE JR. |
| NATURE OF THE CASE: | CIVIL - PERSONAL INJURY |
| TRIAL COURT DISPOSITION: | GRANTED DIRECTED VERDICT IN FAVOR OF DEFENDANT |
| DISPOSITION: | REVERSED AND REMANDED – 05/24/2011 |
| MOTION FOR REHEARING FILED: | |
| MANDATE ISSUED: | |

**EN BANC.**

**IRVING, P.J., FOR THE COURT:**

¶1. Elizabeth Martin sued St. Dominic-Jackson Memorial Hospital for injuries that she received in a slip-and-fall accident on the hospital's premises. At the conclusion of the evidence, the hospital, arguing that Martin had failed to prove causation, moved for a directed verdict. The circuit court agreed and granted the hospital's motion. Aggrieved, Martin appeals and essentially argues that she presented enough evidence regarding the

hospital's alleged negligence and causation to withstand the motion for a directed verdict.

¶2. We agree with Martin that, based on the evidence presented, the jury should have been allowed to determine whether the hospital was negligent and, if so, whether her injuries were proximately caused by the hospital's negligence. Therefore, we reverse and remand for a new trial on the merits.

## FACTS

¶3. On September 27, 2005, Martin slipped and fell, on both knees, on a freshly waxed floor at St. Dominic-Jackson Memorial Hospital during a break in a physical-therapy session that Martin was participating in while a patient at the hospital. According to testimony adduced by the hospital, warning signs had been placed in the area where Martin fell, and Martin and the other participants in the therapy session had been specifically warned to avoid the freshly waxed area. Martin testified that there were no warning signs and that she had not been warned by the hospital's personnel to avoid the area where the fall occurred. In any event, it is undisputed that Martin injured her knees and suffered some damages as a result of her fall. Her knees became swollen, and she was hospitalized overnight and instructed to keep her legs elevated and to use ice packs for the swelling. She was discharged from the hospital the following day and given a prescription for pain medication.

¶4. After Martin was discharged from the hospital, her knees continued to swell, resulting in her seeing her family physician, Dr. Brent Meador. Dr. Meador had an MRI done of Martin's knees, and eventually referred her to Dr. David Gandy. The MRI showed that Martin had a trabecular injury, which is a bruise to the bone, that normally occurs, according to Dr. Gandy, "from some type of direct blow to the knee." The MRI also showed that

Martin had a mild ACL sprain. Dr. Gandy explained: "An ACL is an anterior cruciate ligament. That's one of the two cross ligaments within the knee, and most people hear [about] those in football[-]type injuries, things like that, and it was a mild sprain. It was not a tear or not a major injury." The MRI also showed "some mild marrow edema in the distal femur and proximal tibia." Dr. Gandy explained: "Edema is swelling anywhere, but in this case within the bone marrow, and [the radiologist] thought it could be due to the recent fall or to arthritis."

¶5. When Martin came to see Dr. Gandy, she gave him a history of having pain in her left knee for approximately two years, but she explained that she had just started having pain in her right knee. According to Dr. Gandy: "She had pain with motion[,] and she had pain with stress to various environments, which means pulling the knee in and pulling the knee out, holding the thigh stable." She advised Dr. Gandy that she had fallen approximately two months earlier.

¶6. Dr. Gandy performed arthroscopic surgery on Martin's left knee. The surgery revealed that she had arthritis and a medial and lateral meniscus tear in the left knee. He gave the following explanation regarding a meniscus tear:

> A meniscus is a disc[-]shaped structure. There are two of them within the knee. The medial being on the inner side of the knee and lateral on the outer side of the knee. Their purpose is as a secondary stabilizer. They're not the primary stabilizer like the ligaments are. They prevent more of a side[-]to[-]side kind of gliding motion in the knee. They kind of deepen the socket, and if they are torn, which can occur in a younger person, generally it's from a twisting maneuver. In a person a bit older, it can be from either wear and tear *or an injury, either one.*

(Emphasis added).

¶7. Additional facts, as necessary, will be related during our discussion of the issue.

ANALYSIS AND DISCUSSION OF THE ISSUE

¶8. We review the circuit court's grant or denial of a motion for a directed verdict de novo. *Ryals v. Bertucci*, 26 So. 3d 1090, 1094 (¶16) (Miss. Ct. App. 2009). We review the evidence presented in the light most favorable to the nonmoving party and give that party the benefit of all favorable inferences that may be reasonably drawn from the evidence. *Id*. If the evidence presented creates a question of fact upon which reasonable minds could differ, a directed verdict should not be granted; instead, the issue should be submitted to the jury. *Ross v. Nat'l Forms & Sys. Group, Inc.*, 882 So. 2d 245, 249 (¶11) (Miss. Ct. App. 2004) (quoting *Ducksworth v. Wal-Mart Stores, Inc*., 832 So. 2d 1260, 1262 (¶2) (Miss. Ct. App. 2002)). "A question of fact is created if 'one party swears to one version of the matter in issue and another says the opposite . . . .'" *Id.* at 250 (¶16) (quoting *Regency Nissan, Inc. v. Jenkins*, 678 So. 2d 95, 99 (Miss. 1996)).

¶9. In order to recover against St. Dominic, Martin is required to prove that the hospital owed her a duty, that the hospital breached that duty, that her injuries were caused by that breach, and that she suffered damages as a result. *Mladineo v. Schmidt*, 52 So. 3d 1154, 1162 (¶28) (Miss. 2010). Also, in slip-and-fall cases, such as we have here, the duty owed by a business is to use reasonable and ordinary care to keep its premises reasonably safe for use by its customers and to warn them of any existing dangerous condition not readily apparent that is known to the business, or should have been known to it in the exercise of reasonable care. *Pigg v. Express Hotel Partners, LLC*, 991 So. 2d 1197, 1199-1200 (¶5) (Miss. 2008).

¶10. The evidence is undisputed that Martin fell on a freshly waxed floor at the hospital

while she was a patient there. Therefore, as an invitee of the hospital, the hospital had a duty to warn her of the freshly waxed floor, which could be unusually slippery.

¶11. During the trial, Martin testified that she was not warned by the nurses to avoid the area and that there were no warning or caution signs. Conversely, the hospital's staff testified that all of the patients were warned to avoid the area being waxed and that caution signs were placed around the area. The testimony presented in this case created a question of fact as to whether the hospital failed to warn Martin of the dangerous condition. Even if the evidence is slight, whether a breach of duty occurred is a question that should be determined by the jury. *Hankins Lumber Co. v. Moore*, 774 So. 2d 459, 464 (¶11) (Miss. Ct. App. 2000).

¶12. There was no dispute as to any of the other elements that Martin had to prove except causation. It is clear that Martin suffered damages. The question is whether Martin produced sufficient credible evidence that created a question of fact upon which reasonable minds could differ. If she did, a directed verdict should not have been granted, and the case should have been presented to a jury to abide the jury's verdict on that question. The circuit court adopted the hospital's argument that Martin had "failed to present any testimony or evidence by a physician or expert to a reasonable degree of medical certainty that the [hospital's] alleged negligence proximately caused [Martin's] damages." Relying on *Kidd v. McRae's Stores Partnership*, 951 So. 2d 622 (Miss. Ct. App. 2007), the circuit court concluded that, on the evidence presented, the jury could not use the medical evidence presented to reach a verdict. We find that the facts here are quite different from the facts in *Kidd*. In *Kidd*, the circuit court did not allow evidence of future medicals where the physician never testified

as to the future need for two surgeries. *Id.* at 623 (¶5). The issue here is not the exclusion of evidence because of a lack of medical basis, but the submission of the issues of negligence and causation to the jury based on the medical evidence presented. It is in the province of the jury to determine the cause of Martin's injuries, not the circuit court. As noted, our inquiry must be whether there was credible evidence that created a question of fact upon which reasonable minds could differ as to the cause of Martin's injuries. It is clear that the answer is an emphatic "yes."

¶13. First, there is overwhelming and uncontradicted evidence that Martin's fall was caused by the slippery, freshly waxed floor at the hospital. Second, the evidence is uncontradicted that Martin landed on both of her knees and that they immediately began to swell, necessitating utilization of ice packs, an overnight stay in the hospital, and pain medication. It is also undisputed that when she underwent an MRI a few days after the fall, it showed a mild ACL sprain, the kind that is quite often suffered by athletes in the contact sport of football, and edema in the bone marrow. We find that on these facts, reasonable minds could not even differ as to whether some of Martin's injuries were caused by her fall at the hospital, leaving the only remaining question to be whether the hospital breached its duty to Martin. And on this point, our law is clear that this is a classic question for the jury since the evidence is conflicting.

¶14. The more difficult question is whether the edema in the bone marrow of Martin's knee and the meniscus tear were caused by Martin's fall or by the normal wear and tear that occurs as a result of the aging process and the progression of arthritis in the body.[1] The medical

[1] At the time of Martin's arthroscopic surgery, she was fifty-six years old.

evidence on this point, as given by Dr. Gandy, is that the tear was caused by "wear and tear or an injury, either one." As to the edema, the radiologist that read the MRI, according to Dr. Gandy, believed the edema was due to the recent fall or to arthritis. While Dr. Gandy did not state that the meniscus tear was caused by Martin's fall, it is noteworthy that he did not say that the tear could not have been caused by the fall or that there is no medical evidence supporting the notion that a meniscus tear can occur when one falls directly on the knee. Suppose instead of one physician testifying that the tear was caused by either arthritis conditions or by the blow to the knee from the fall, there had been two physicians, one testifying on behalf of Martin and the other testifying on behalf of the hospital. Suppose further that Martin's expert had testified that the meniscus tear was caused by the blow to the knee from the fall while the hospital's expert had testified that the tear was caused by the progression of Martin's arthritis. Could it be legitimately argued that the matter should not be presented to the jury for resolution of the question? How then is the legal implication different because one expert said both? It is certainly reasonable that the jury could have decided that the cause was the impact to the knee from the fall, rather than the progression of Martin's arthritis. This is also a classic situation where the evidence creates a question of fact—whether the edema and meniscus tear were caused by the wear and tear of the aging process, arthritis, or by the injury to the knee from the fall. Reasonable minds could differ as to the cause, but not because of a lack of medical evidence to support the choice made. That is so because Martin suffered from arthritis as well as from the fall on both of her knees. A jury might very well determine, based on the fact that Martin had suffered from arthritis since 2004, that the tear occurred as a result of this condition. On the other hand, a jury

might determine, based on Martin's testimony without objection that she had never had this kind of problem before, that the tear occurred as a result of the acute impact to her knee from the fall. Therefore, since reasonable minds could reach different conclusions as to the cause of her meniscus tear, the circuit court erred in directing a verdict for the hospital. We find that the jury should have been allowed to make that determination based upon the totality of the evidence presented.

¶15. **THE JUDGMENT OF THE CIRCUIT COURT OF HINDS COUNTY IS REVERSED, AND THIS CASE IS REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLEE.**

**LEE, C.J., GRIFFIS, P.J., AND CARLTON, J. CONCUR. ROBERTS AND MAXWELL, JJ., CONCUR IN PART AND IN THE RESULT WITHOUT SEPARATE WRITTEN OPINION. ISHEE, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY MYERS AND BARNES, JJ. RUSSELL, J., NOT PARTICIPATING.**

**ISHEE, J., DISSENTING:**

¶16. I respectfully dissent with the majority on the issue of causation as to whether Martin offered sufficient testimony to create a question of fact upon which reasonable minds could differ. I also dissent with the majority's discussion of breach of duty—an issue that was not raised by either party on appeal.

¶17. First, I find that Martin's medical expert, Dr. Gandy, did not provide sufficient evidence for a jury to determine that Martin's injuries were proximately caused by her fall at St. Dominic. The hospital argues, and I agree, that Martin failed to provide any expert testimony to prove causation and that the trial court did not misapply any case law in reaching its decision.

¶18. The basis of the trial court's decision focused on the causation element. Proximate cause contains two elements: (1) cause in fact and (2) legal cause. *Kaigler v. City of Bay St. Louis*, 12 So. 3d 577, 583 (¶30) (Miss. Ct. App. 2009) (citing *Glover ex rel. Glover v. Jackson State Univ.*, 968 So. 2d 1267, 1277 (¶31) (Miss. 2007)). In this case, the trial court's ruling focused on the cause-in-fact element, which means that the injury would not have occurred but for the defendant's negligence. *Id.*

¶19. St. Dominic contends that Dr. Gandy did not testify to a reasonable degree of medical certainty whether Martin's knee injuries were caused by her fall. Yet Martin insists that Dr. Gandy's statement that the injuries were caused by wear and tear or an acute injury was sufficient. After reviewing the record, I find that Dr. Gandy's testimony was too speculative for a jury to find causation for the injury.

¶20. There are no magic words necessary to establish proximate cause, but the expert's opinion must be based on a reasonable degree of medical certainty. *Vanlandingham v. Patton*, 35 So. 3d 1242, 1249 (¶37) (Miss. Ct. App. 2010). In *Vanlandingham*, a medical-malpractice case, we found that although the testifying expert did not always use the terms "within a reasonable degree of medical certainty," the import of his testimony was apparent. *Id.* In *Kidd v. McRae's Stores Partnership*, 951 So. 2d 622, 626 (¶19) (Miss. Ct. App. 2007), another medical-malpractice case, this Court also stated the following:

> [W]hen an expert's opinion is not based on a reasonable degree of medical certainty, or the opinion is articulated in a way that does not make the opinion probable, the jury cannot use the information to make a decision. Failure to properly qualify an expert opinion typically occurs in testimony that is speculative . . . . It is the intent of the law that if a physician cannot form an opinion with sufficient certainty so as to make a medical judgment, neither can a jury use that information to reach a decision.

(Internal citations and quotations omitted).

¶21. Dr. Gandy was unable to appear in court; thus, his videotaped deposition was admitted into evidence. As stated by Dr. Gandy, Dr. Meador referred Martin to him. During her initial visit, Martin complained of pain in both knees. When giving her medical history, Martin told Dr. Gandy that she had experienced pain in her left knee for two years, and she had only recently begun having pain in her right knee. She further told Dr. Gandy that she had also fallen at the hospital two months prior, sustaining direct blows to her knees.

¶22. Dr. Gandy reviewed the MRI that Dr. Meador had taken of Martin's knees. According to Dr. Gandy, the MRI revealed that Martin had mild patella alta with evidence of a trabecular injury bruising to her left knee. Dr. Gandy explained that bruising of that type is normally caused by some type of blow to the knee. Dr. Gandy also stated that Martin had sustained a mild anterior cruciate ligament (ACL) sprain, joint effusion (fluid on the knee), and mild marrow edema (swelling) in her left knee. The MRI revealed that Martin's right knee had moderate osteoarthritis. In his initial diagnosis, Dr. Gandy determined that Martin had internal derangement, which means that something is wrong inside the knee, but she primarily had arthritis in both knees.

¶23. Dr. Gandy gave Martin three options: (1) wear a knee brace, (2) receive cortisone injections, or (3) undergo an arthroscopic surgery. Martin elected to have the surgery. During the surgery, Dr. Gandy discovered that Martin had two meniscus tears in her left knee.

¶24. During the deposition, Martin's trial counsel asked Dr. Gandy whether he had recommended the surgery because of the meniscus tears. Dr. Gandy said that was not the

reason he had recommended the surgery; because until the surgery, he was unaware that Martin had meniscus tears due to the fact that they were not visible on Martin's MRI. Dr. Gandy stated that he suggested the surgery to Martin to address her symptoms, and he did not know if those symptoms were due to her arthritis. Martin's trial counsel also asked Dr. Gandy what caused the meniscus tears. Dr. Gandy responded that a meniscus tear could be caused by normal wear and tear or an acute injury.

¶25. As indicated by Dr. Gandy, the surgery was successful. Dr. Gandy testified that on December 28, 2005, he examined Martin and recommended physical therapy. However, Martin declined the physical therapy at that time. Dr. Gandy examined Martin again on March 22, 2006, and she complained of pain in her knee. As a result, Dr. Gandy administered cortisone injections to Martin's knee. Dr. Gandy testified that because of Martin's arthritis, he expected Martin to continue to experience pain.

¶26. On direct examination, Martin's trial counsel specifically asked Dr. Gandy what caused meniscus tears. Dr. Gandy responded: "In a person a bit older, it can be from either wear and tear or an injury, either one." On cross-examination, St. Dominic's trial counsel asked Dr. Gandy whether he explained to Martin what could have caused her meniscus tears. Dr. Gandy replied: "I told her it could come from wear and tear or from an acute injury."

¶27. Dr. Gandy did not opine as to whether Martin's fall at the hospital actually caused or contributed to her injuries, thus leaving the jury to speculate as to causation. Since there is no direct testimony regarding a cause-in-fact, a jury could not use Dr. Gandy's testimony to make an informed decision. Based on the foregoing, I find that the trial court did not err by granting the hospital’s motion for a directed verdict.

¶28. Martin also argues that the trial court misapplied case law in making its decision. For the sake of judicial efficiency, I would have declined to address the details of Martin's argument. Nonetheless, the majority has examined the challenged citations, as have I. *See City of Jackson v. Spann*, 4 So. 3d 1029, 1038-39 (¶¶33-36) (Miss. 2009) (ruling that an award of future medical costs was error where the doctor's testimony regarding those costs was a guess and not based upon a reasonable degree of medical certainty); *Kidd*, 951 So. 2d at 626-27 (¶¶17-20) (finding that the trial court's order prohibiting the admission of the treating physician's testimony regarding the cost of future surgeries was not an abuse of discretion where the physician did not express his opinion to a reasonable degree of medical certainty). While the cases challenged by Martin are factually distinguishable from her case, the cases did provide statements of law that were applicable to the issues before the trial court. Thus, I disagree with the majority's opinion, and find that the trial court did not misapply the case law used to support its ruling.

¶29. Further, I also dissent with the majority's discussion of breach of duty. In its opinion, the majority has addressed whether Martin provided sufficient evidence to create a question of fact as to whether the hospital failed to warn Martin of the dangerous condition of the freshly waxed floors. However, neither Martin nor the hospital raised this issue in their briefs, nor does it appear that either party challenged this issue at trial.

¶30. We recognize that issues not brought on direct appeal may be reviewed under the plain-error doctrine. However, "[i]n order to reverse under the plain error doctrine, the reviewing court must find both error and harm." *HWCC-Tunica, Inc. v. Jenkins*, 907 So. 2d 941, 944 (¶7) (Miss. 2005) (citation omitted). The majority opinion does not address either

error or harm. Therefore, I respectfully must also dissent from the majority's review of this issue.

**MYERS AND BARNES, JJ., JOIN THIS OPINION.**